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## **ISSUES PRESENTED FOR REVIEW**

Defendants have endeavored herein to respond to the two issues presented by Plaintiffs for review, the second of which is lengthy, argumentative, and convoluted. However, to be clear and consistent with the Petition for Leave to Appeal and the record below -- as well as comply with Rule 341(h)(3) -- Plaintiffs should have phrased the two issues as follows:

1. “Whether the trial and appellate courts correctly ruled that the Section 5-12-080(f) of the Chicago Residential Landlord Tenant Ordinance is a ‘statute’ within the contemplation of 735 ILCS 5/13-202.”

2. “Whether the trial and appellate courts correctly ruled that the relief contemplated by Section 5-12-080(f) of the Chicago Residential Landlord Tenant Ordinance is a ‘penalty’ within the contemplation of 735 ILCS 5/13-202.”

To the extent that the foregoing two issues were omitted from the two issues that Plaintiffs presented for review, Defendants have nonetheless attempted to address them herein, on grounds that the foregoing two issues neutrally and accurately characterize the controversy that is before this Court.

## **STATEMENT OF FACTS**

On or about May 5, 1999, Plaintiffs signed the first of two residential leases for “Apartment 2” at 1439 N. Dearborn, Chicago, Illinois (the “Apartment”). (A. 4). The first lease was in effect two years. On or around April 30, 2001, the parties entered into a second written lease for a second 2-year term, from June 1, 2001, to May 31, 2003 (the “Lease”). (A. 10-11). The monthly rent contemplated by the Lease was \$4,500 the first

year, and \$4,600 for the second year of the term. Id. Pursuant to the Lease, the Plaintiffs were required to maintain an \$8,400 deposit to secure the performance of their obligations under the Lease. Id.

On or around November 16, 2001, about 18 months before the end of the stated Lease term, Plaintiffs moved out of the Apartment. Id. Thereafter, Defendants did not return Plaintiffs' \$8,400 Security Deposit. Id.

On April 25, 2006 -- about four and a half years after they quit the Apartment -- Plaintiffs filed their complaint against Defendants. (A. 3, A. 25). In the Complaint, Plaintiffs alleged that: "Prior to November 16, 2001, the Defendants agreed to allow the Plaintiffs to move and to return their security deposit because of its [sic] inability to repair [a] leak" (§11); "Plaintiffs fulfilled all conditions required of them under the Lease as modified by the agreement that allowed them to move early" (§15); and "[p]ursuant to 5-12-080(d) of the Chicago Landlord Tenant Ordinance, Chicago landlords and their property managers are liable for two times the security deposit when they owe the security deposit but fail to pay it" (§20).

Count I of the Complaint pleads that Defendants violated Subsection (c) of Section 5-12-080 of the Chicago Residential Landlord Tenant Ordinance ("RLTO"). That Subsection of the RLTO generally requires landlords to pay interest on security deposits to tenants within 30 days after the end of each 12-month rental period. Chicago Municipal Code §5-12-080(c). Count II of the Complaint pleads that Defendants have violated Subsection (d) of Section 5-12-080 of the RLTO. That Subsection of the RLTO states that "landlord shall, within 45 days after the date that the tenant vacates the dwelling unit . . . return to the tenant the security deposit or any balance thereof and the

required interest thereon . . .” Chicago Municipal Code §5-12-080(d). Based these two alleged violations, the Complaint seeks two discrete awards, each of them equal to two (2) times the amount of Plaintiffs’ security deposit, plus interest. The two awards are each premised on Section 5-12-080(f) of the RLTO, which states as follows:

[i]f the landlord or landlord’s agent fails to comply with any provision of Section 5-12-080(a) - (e), the tenant shall be awarded damages in an amount equal to two times the security deposit plus interest at five percent. This subsection does not preclude the tenant from recovering other damages to which he may be entitled under this chapter.

Chicago Municipal Code §5-12-080(f).

In Count I, Plaintiffs pray for “. . . an award of \$16,800 plus attorney’s fees, court costs and prejudgment interest of 5% per year from November 16, 2001,” for Defendants’ failure to return the Security Deposit. In Count II, Plaintiffs pray for “an award of \$13,200 [sic] plus attorney’s fees and court costs” for Defendants’ failure “to pay or credit interest on the Plaintiffs’ security deposits every year.” However, the request for an “award” of “\$13,200 plus attorney’s fees and court costs” in Count II is an error, and was intended to state “\$16,800 plus attorney’s fees and court costs.” This implies a total of \$33,600 in requested monetary “awards” for Defendants’ failure timely to return and pay interest on the \$8,400 Security Deposit, exclusive of attorney’s fees, court costs and prejudgment interest.

On June 27, 2006, Defendants moved to dismiss Counts I and II of the Complaint on grounds that the 2-year limitations period of Section 13-202 bars those claims. (A. 12). Plaintiffs responded that Section 13-202 does not bar Counts I and II because

Section 13-202 does not apply to municipal ordinances. Plaintiffs further argued that their request for monetary awards totaling \$33,600 -- exclusive of attorney's fees, court costs and prejudgment interest -- was not, in any event, a "penalty" within the contemplation of Section 13-202. Plaintiffs contended that the limitations period applicable to Counts I and II under Illinois law is either 5 years, pursuant to the "catch-all provision" of 735 ILCS 5/13-205, or 10 years for a written contract pursuant to 735 ILCS 5/13-206. (A. 20-26).

On September 20, 2006, the circuit court entered a final and appealable Order dismissing the Complaint with prejudice, and granting plaintiffs "leave to file an amended complaint raising new matter not previously pled within 14 days."

On October 4, 2006 Plaintiffs filed an amended complaint (hereinafter the "Amended Complaint"). (Appellees' Supp. App., at Exh. 1.) The Amended Complaint contains a single count styled "Breach of Contract." The Amended Complaint omits any mention of the RLTO. Like its predecessor Complaint, the Amended Complaint alleges that Defendants agreed orally to shorten the stated Lease term and return the Security Deposit (¶10), and that "Plaintiffs fulfilled all conditions required of them under the Lease as modified by the [(oral)] agreement that allowed them to move early" (¶14), but Defendants failed to abide by that agreement (¶¶15, 16). Plaintiffs allege that Defendants' "failure to return the security deposit is a failure to follow the terms of a written instrument" (¶21). As damages for Defendants' breach of the Lease, Plaintiffs request, in the Amended Complaint, "an award of \$8,400, [plus] court costs and prejudgment interest of 5% per year from November 16, 2001 . . . ."

On October 18, 2006, while the Amended Complaint remained pending, Plaintiffs

filed a Notice of Appeal in respect of the circuit court order “dismissing the Complaint as being filed beyond the limitations period.” (A. 34).

Thereafter, the breach of lease claim pled in the Amended Complaint (which was never challenged on grounds that it was time-barred) was referred to mandatory arbitration and set for a hearing on February 26, 2007.

On February 23, 2007, Plaintiffs moved to continue the arbitration hearing on the Amended Complaint. The court granted the motion and set the Amended Complaint for an arbitration hearing on April 19, 2007. (Appellees’ Supp. App., at Exh. 2.)

On April 18, 2007, Plaintiffs moved for a further continuance of the arbitration hearing on the Amended Complaint. At that time, the circuit court entered an Order i) denying the motion to continue, ii) finding that Plaintiffs had voluntarily dismissed their case, iii) striking the arbitration hearing for April 19, 2007, and iv) awarding costs to Defendants upon any re-filing of the Amended Complaint. (Appellees’ Supp. App., at Exh. 3.)

On August 10, 2007, the First District held that its decision in Namur v. Habitat Company, 294 Ill App. 3d 1007 (1<sup>st</sup> Dist. 1998), was dispositive of the limitations period applicable to Counts II and III of the Complaint. The appellate court held as follows:

Consistent with the reasoning and holdings of Namur, we find that plaintiffs’ complaint, which sought damages pursuant to section 5-12-080(f) of the RLTO, is subject to the two-year statute of limitations for actions for a “statutory penalty” contained in section 13-202 of the Code of Civil Procedure 735 ILCS 5/13-202 (West 2004). First, the term

“statutory,” as used in section 13-202 of the Code, applies to municipal ordinances. Namur, 294 Ill App 3d at 1013; Sternic v. Hunter Properties; Inc., 344 Ill App 3d 915, 918 (2003). Second, the damages available for violations of subsections (c) and (d) of section 5-12-080 of the RLTO are imposed without any showing of actual damages suffered by the tenant. As observed in Namur, section 5-12-080(f) of the RLTO specifies the formula by which the amount of damages is to be calculated. Namur, 294 Ill. App. 3d at 1011. Under section 5-12-080(f) of the RLTO, if a landlord fails to timely return a security deposit or timely pay interest on the security deposit, the tenant “shall be awarded damages in an amount equal to two times the security deposit plus interest at five percent.” Chicago Municipal Code § 5-12-080(f) (amended November 6, 1991). The tenant will receive double the security deposit no matter the number of days, weeks, or months the landlord is late in retaining the security deposit or in paying interest. Thus, damages are calculated regardless of any actual loss suffered by the tenant. We conclude that section 5-12-080(f) imposes liability on landlords for violations of subsections (c) and (d) independent of tenants’ actual loss. Therefore, as in Namur, we find that section 5-12-080(f) is penal.

(A. 1). Plaintiffs filed a Motion to Reconsider in the appellate court.

On September 26, 2007, in response to Plaintiffs’ Motion to Reconsider, the appellate court granted Plaintiffs leave to file an amended complaint. (A. 2).

Plaintiffs’ Petition for Leave to Appeal in this Court asserted three points relied

upon for relief, as follows:

1. The First District's decision in this case conflicts with the Third District's decision in City of Peoria v. Toft, 215 Ill. App. 3d 440, 443-44 (3<sup>rd</sup> Dist. 1991).
2. There appears to be no controlling authority for determining how to apply the distinction between statutory penalty and remedial relief in the 2-year limitations period of 735 ILCS 5/13-202.
3. The First District's decision has implicitly contradicted this Court's *dicta* in Krautsack v. Anderson, 223 Ill.2d 541, 558 (2006) that encourages courts to find ways to advance the "laudatory" goals of consumer-related enactments rather than disregard consumers' claims.

Plaintiffs' Petition for Leave to Appeal was granted by this Court on January 30, 2008.

Plaintiffs' Opening Brief requests that this Court remand the case with instructions that Plaintiffs may proceed on their RLTO "ordinance claims" or, in the alternative, may "file an amended complaint that seeks contractual relief only without the consumer-related protections afforded by the Chicago Residential Landlord Tenant Ordinance."

#### **STANDARD OF REVIEW**

Both of the issues presented to this Court for review involve the interpretation of a statute or ordinance. The interpretation of a statute presents a question of law which this Court reviews *de novo*. See People v. McCarty, 223 Ill. 2d 109, 124 (2006) (constitutionality of Illinois Controlled Substances Act reviewed *de novo*); Lawrence v.

Regent Realty Group, 197 Ill. 2d 1, 9 (2001) (construction and legal effect of RLTO reviewed *de novo*).

## ARGUMENT

### I. INTRODUCTION

This controversy turns on the interpretation of two written enactments of two distinct legislative bodies, the General Assembly of the State of Illinois, and the City Council of the City of Chicago. This Court is asked to construe 735 ILCS 5/13-202 (hereinafter “Section 13-202”) to determine whether the 2-year limitations period applicable to a “statutory penalty” for personal injury contained therein applies to an action brought pursuant to a municipal “ordinance.” In addition, the Court is asked to construe Section 5-12-080 of the Chicago Municipal Code, also known as the Chicago Residential Landlord Tenant Ordinance, to determine whether the “award” contemplated by Subsection 5-12-080(f) thereof is a “penalty” within the contemplation of Section 13-202.

The same rules that govern the interpretation of statutes apply in construing municipal ordinances. Starr v. Gay, 354 Ill. App. 3d 610, 612 (1<sup>st</sup> Dist. 2004); Monat v. County of Cook, 322 Ill. App. 3d 499, 506 (1<sup>st</sup> Dist. 2001) (*citing* Antunes v. Sookhakitch, 146 Ill. 2d 477, 487 (1992) (third-party complaint properly dismissed as time-barred)); Warren v. Zoning Board of Appeals, 255 Ill. App. 3d 482, 486 (5<sup>th</sup> Dist. 1994). As in the case of a statute, the primary objective in construing an ordinance is to ascertain and give effect to the intent of the lawmaking body as disclosed by the language contained in the ordinance. Starr, 354 Ill. App. 3d at 612-13. The best indicator of the intent of the lawmaking body comes from the language of the ordinance itself, but may

also include consideration of the reason behind, and the necessity for the ordinance. American Nat'l Bank v. Powell, 293 Ill. App. 3d 1033, 1038 (1<sup>st</sup> Dist. 1997). “[I]n construing statutes or ordinances the same are to be construed as an entirety and the intention of the legislative body gathered from a consideration of the whole ordinance.” Sullivan v. Cloe, 277 Ill. 56, 61 (1917).

Plaintiffs allege that an unspecified oral modification of the parties’ written, two-year lease permitted Plaintiffs to quit the leasehold mid-term, in November 2001, without forfeiting an \$8,400 security deposit (hereinafter the “Security Deposit”). For almost five years thereafter, Plaintiffs took no legal action in respect of the unreturned Security Deposit. When they finally filed their Complaint, on April 25, 2006, Plaintiffs did not seek a return of the Security Deposit. (A. 3, 4, 25.) Instead, Plaintiffs sought, in Counts I and II of the Complaint, two “awards” -- each calculated pursuant to a formula in the Chicago Residential Landlord Tenant Ordinance. *See* Chicago Municipal Code §5-12-080(f). Pursuant to that formula, the separate awards sought in each of Count I and Count II are equal to *two times* the amount of the Security Deposit (*i.e.*, \$16,800.00), plus attorney’s fees, court costs and prejudgment interest. As a result of Plaintiffs’ “stacking” of the two discrete RLTO awards, the total *ad damnum* for Counts I and II is \$33,600, exclusive of costs, fees, and pre-judgment interest.

The circuit court dismissed Plaintiffs’ monetary claims -- seeking \$33,600 for the failure to return and pay interest on an \$8,400 Security Deposit -- on grounds that those monetary claims were barred by the 2-year limitations period applicable to a “statutory penalty” in 735 ILCS 5/13-202. The appellate court upheld that ruling. In this Court, Plaintiffs contend that the appellate and circuit courts erred first, because the self-styled

“Ordinance” in question is not a “statute” for purposes of Section 13-202, and second, because even if the RLTO were a “statute” for purposes of Section 13-202, the monetary awards sought by Plaintiffs under Section 5-12-080(f) of the RLTO are remedial, not penal. As demonstrated below, neither contention has any merit.

**II. THE APPELLATE COURT CORRECTLY FOUND THAT SECTION 13-202 APPLIES TO MUNICIPAL ORDINANCES AND THAT RLTO SECTION 5 12 080(F) CONTEMPLATES PENALTIES UNDER THE APPLICABLE TEST.**

For the reasons set forth in its Mandate, the First District Appellate Court correctly found that Section 13-202 applies to municipal ordinances and that the three sections of the RLTO invoked by Plaintiffs in this case contemplate penalties, as distinct from the remediation of actual damages. This Court should affirm the First District Appellate Court in this case because it correctly found that the phrase “statutory penalty” in Section 13-202 is broad enough to include Section 5-12-080(f) of the RLTO, notwithstanding the fact that the RLTO characterizes itself as an “Ordinance,” because the monies sought by Plaintiffs in Counts I and II are “penalties” under Illinois’ clear and sensible test for identifying a penalty.

**A THE PHRASE “STATUTORY PENALTY” IN SECTION 13-202 IS BROAD ENOUGH TO INCLUDE SECTION 5-12-080(F) OF THE RLTO, NOTWITHSTANDING THE FACT THAT THE RLTO CHARACTERIZES ITSELF AS AN “ORDINANCE.”**

According to Black’s Law Dictionary, a “statute” is “[a] formal written enactment of a legislative body, whether federal, state, city or county.” Black’s Law Dictionary 1410 (7<sup>th</sup> Ed. 1999). In Illinois, written enactments of municipalities are generally

referred to as “ordinances,” to distinguish them from enactments of the state legislature. Ordinances differ from statutes in respect of their source, not their fundamental nature, because an ordinance is “a legislative act and is the equivalent of a municipal statute.” Namur v. Habitat Company, 294 Ill App. 3d 1007, 1013 (1<sup>st</sup> Dist. 1998) (*citing* Halford v. Topeka, 234 Kan. 934, 939, 677 P. 2d 975, 980 (1984) (“[a]n ordinance is the equivalent of a municipal statute”)); Black’s Law Dictionary, 989 (5<sup>th</sup> Ed. 1979)). See also James v. Rapides Parish Police Jury, 236 La. 493, 497 (1959) (“an ordinance is a local law or rule prescribed by a public subdivision or a municipality which emanates from its legislative authority as distinguished from administrative action; it is a permanent rule, a law or statute.”); § Beth A. Buday and Victoria A. Braucher, 5 McQuillin, *The Law of Municipal Corporations* § 15.01 (3<sup>rd</sup> Ed. 1996) (“[w]hile the term ‘ordinance’ has been used in various senses, the term is generally used, in this country, to designate a local law of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform, and permanent rules of conduct, relating to the corporate affairs of the municipality.”); 43 C. J. §§ 796-798 (“‘Ordinances’ as a term of municipal law [which] is the equivalent of ‘legislative action’... a police or domestic regulation [as opposed to public or general law]... more solemn and formal than a ‘resolution.’ An ordinance is a continuing regulation -- a permanent rule of government, while a resolution is usually declared not to be the equivalent of an ordinance, . . . a resolution passed with all the formalities required for passing ordinances may operate as an ordinance regardless of the name by which it is called”) (emphasis supplied); In re Edgewood Ave. (Mt. Vernon), 195 Misc. 314, 323 (N.Y. Sup. Ct. 1948) (“[a]n ordinance prescribes some permanent rule of conduct or government, to continue in force until the ordinance is repealed, and is

distinctively a legislative act.”) (*citing 2 McQuillin Municipal Corporations*, Second Edition, § 663, page 658)); Upper Penns Neck Tp. v. Lower Penns Neck Tp., 20 N.J. Super. 280, 286 (Law Div. 1952) (“‘Ordinance,’ as a term of municipal law, is the equivalent of legislative action, and hence its employment in a statute carries with it by natural, if not necessary, implication the usual incidents of such action. If this were not so, the power to pass an ordinance would not carry with it the power to introduce it, or to refer it, or to amend it, or to move for its reconsideration, or to apply to it any of the legislative or parliamentary usages that universally obtain in deliberative bodies as incidents of legislative action.”).

In O’Connell v. Bruce, 710 A. 2d 674 (R.I. 1998), the Supreme Court of Rhode Island considered a challenge to the validity of a pension fund for disabled police and firefighters on grounds that it was created by a town council resolution, instead of an ordinance. The court rejected that challenge on grounds that it -- as does the challenge in this case -- exalted form over substance:

“What’s in a name?” Does a municipal enactment smell as sweet legally whether it is called a resolution, an ordinance, or, for that matter, by any other name? In the context of this case we must decide if a town council’s resolution creating a pension fund for disabled police officers and firefighters ran afoul of enabling legislation authorizing the council to create the fund . . . by ordinance . . . . Because the challenged resolution was in substance and effect the functional equivalent of an ordinance . . . the town’s municipal pension fund was legally established when it was first created . . . by a town council resolution rather than by an ordinance.

Id. at 675. The same principle applies in this case. The substance and effect of a legislative enactment does not depend on whether it is called a resolution, an ordinance, or a statute -- or whether it is passed in Springfield, or Chicago. In O'Connell, the court found that notwithstanding a difference in name, a municipal resolution was in substance and effect the functional equivalent of an ordinance. Notwithstanding a difference in name, the municipal ordinance in this case is in substance and effect the functional equivalent of an enactment of the General Assembly -- at least for purposes of the applicable statute of limitations.

In American Country Insurance Co. v. Wilcoxon, 127 Ill. 2d 230 (1989), a pedestrian (Wilcoxon) was struck by a Checker cab that was, at the time of the accident, being driven by an individual who was not a party to a lease with Checker. Wilcoxon filed a personal injury suit. Checker's insurer ("American"), which had issued to Checker a bond under the Illinois financial responsibility statute governing taxicab owners, sought and obtained a declaration that it had no duty to cover Wilcoxon's injuries on grounds that a rider to the bond excluded coverage for non-lessee drivers. The appellate court reversed on grounds that "protection of the public under financial responsibility statutes transcends the private agreement between the parties, where the agreement runs counter to sound public policy." Id. at 234.

In this Court, American argued, among other things, that the appellate court decision was in conflict with Chicago Municipal Code Section 28-9 (1982), which provides that only a lessee or contractor may operate a cab during the term of the lease or contract. American argued that it had a right to exclude coverage under the bond for non-lessee drivers, inasmuch as such drivers are barred from driving a cab under a municipal

ordinance. This Court rejected American's argument, as follows:

The Chicago ordinance regulates who may drive a cab in the City of Chicago. It has no relevance to cab owners and their sureties' responsibilities under [the Illinois financial responsibility statute governing taxicab owners]. While [the non-lessee driver] may have violated the ordinance in this case, neither Checker nor [American] may take advantage of a municipal ordinance to negate their responsibility under a State statute. An insurer cannot defeat the purpose of [the statute], and its . . . requirements, by relying on a provision of a municipal code that prohibits a nonlessee from driving a cab. To allow plaintiff to limit its liability by relying on a municipal ordinance would elevate municipal law over State law and violate the rule that a municipal statute that conflicts with a State statute is void.

Id. at 243. The same reasoning applies in this case. Plaintiffs in this case seek to exempt a municipal ordinance from a limitations period imposed by state law. Plaintiffs' argument, if accepted, would elevate municipal law over State law and violate the rule that a "municipal statute" that conflicts with a State statute is void.

It is the public policy of this State, as expressed in Section 13-202, that litigants who seek to penalize -- as distinct from redress -- misconduct that causes personal injury must do so more promptly than those who seek merely to be made whole. There is no reason that this general principle should apply to a litigant who lives in an unincorporated area, subject to state law, but not to another who lives in a city and brings a private cause of action pursuant to a local ordinance. It should

not matter whether the private plaintiff who seeks to exact a penalty for a personal injury does so pursuant to a legislative enactment passed in Springfield, or in Chicago. The policy concerns are the same in either case. There is no reason why penalties imposed by aldermen in the City of Chicago should be inherently more durable than those enacted by state legislators in Springfield.

**B. THE “AWARDS” SOUGHT BY PLAINTIFFS PURSUANT TO THE RLTO ARE NOT REMEDIAL BECAUSE AS A MATTER OF LAW THEY DO NOT INCLUDE A RETURN OF PLAINTIFFS’ SECURITY DEPOSIT.**

Plaintiffs suggest that if they if they are prevented from proceeding on Counts I and II of the Complaint, and are thereby prevented from obtaining two awards aggregating \$33,600 pursuant to the RLTO, this will be tantamount to denying them any remedy, and any opportunity to be made whole for Defendants’ failure to return or pay interest on the \$8,400 Security Deposit. Plaintiffs are incorrect, as a matter of law. The notion that Plaintiffs have, pursuant to their two RLTO claims, sought a return of their Security Deposit misstates the nature of the RLTO provisions in question, and conflates a penalty payable for late payment of the Security Deposit with the Security Deposit itself.

The case of Solomon v. American Nat’l Bank & Trust Co., 243 Ill. App. 3d 132 (1<sup>st</sup> Dist. 1993), is instructive here. In Solomon, tenants (collectively “Solomon”) leased an apartment from defendant (“ANB”) and paid ANB \$1,350 as a security deposit. On April 30, 1991, the end of the lease term, Solomon vacated the apartment. After Solomon vacated the apartment, ANB advised that the security deposit would be returned net of deductions of \$445.34 for late charges and cleaning, resulting in a refund of only \$904.66. ANB mailed the security deposit refund check in an envelope postmarked June

27, 1991. Solomon crossed out a restrictive endorsement and cashed the refund check. Later, Solomon brought suit against ANB pursuant to the RLTO for ANB's failure to return the security deposit within 45 days after Solomon vacated the apartment, in violation of Section 5-12-080(d) of the RLTO.

The trial court entered judgment for Solomon in the amount of \$3,000 plus costs, representing a doubling of Solomon's security deposit ( $\$1,350 \times 2 = \$2,700$ ), plus \$300 in attorney fees. On appeal, ANB argued that that the \$3,000 judgment amount was \$904.66 too high, because the award for a late security deposit refund under RLTO Sections 5-12-080(d) and 5-12-080(f) included the amount of the security deposit itself, such that the court was required to deduct from the judgment the amount of the \$904.66 partial security deposit refund previously paid to Solomon. By contrast, Solomon argued that the award pursuant to Section 5-12-080(f) did not include any amount for the security deposit itself, and was in addition to, and independent of, a refund of that security deposit.

The First District noted that when construing an ordinance, a court should consider each section of the ordinance in connection with every other section, rather than isolating sections. After considering the language of Section 5-12-080(f), the court noted that the RLTO also provides that "[t]o the extent that this chapter provides no right or remedy in a circumstance, the rights and remedies available to landlords and tenants under the laws of the state of Illinois or other local ordinances shall remain applicable." Chicago Municipal Code § 5-12-190. The First District then found that "[r]eading the ordinance as a whole, . . . the [security] deposit is not included in the statutory damages available under subsection [5-12-080](f). . . . As the ordinance does not expressly

provide for the return of the deposit in the situation presented on appeal, plaintiffs' recovery of the deposit itself is governed by State law or other local ordinances. . . . Consequently, [ANB] has failed to demonstrate that the trial court's award of \$3,000 in damages was an abuse of discretion in this case." Solomon, 243 Ill. App. 3d at 137.

Applying the reasoning of Solomon to this case, it is apparent that, as a matter of law, neither Count I nor Count II includes, in the award requested therein, a return of the underlying Security Deposit. That is because the monetary awards for the two sections of the RLTO invoked by Plaintiffs in Counts I and II are independent of, and *in addition to* a return of an underlying security deposit. Plaintiffs' Complaint fails to include a count that would require a return of the Security Deposit. To obtain both remedial and penal damages for a landlord's failure to return a security deposit (as distinct from the untimely return of a deposit), a claimant must plead not only the penalties contemplated by the RLTO, but also a separate and independent request for return of the security deposit itself. Solomon thus brings the awards at issue here squarely within the holding of Sun Theatre Corp. v. RKO Radio Pictures, 213 F. 2d 284, 286-88 (7<sup>th</sup> Cir. 1954) (applying Illinois law). That case held that the predecessor of Section 13-202 applied to an action under federal antitrust law that -- like Section 5-12-080(f) of the RLTO -- did not include recovery for actual damages but specified a formula by which (treble) damages were to be calculated.

The relief afforded by RLTO Sections 5-12-080(c), 5-12-080(d) and 5-12-080(f), properly understood, can be illustrated with a hypothetical. Leaving aside, for purposes of this hypothetical, the question of interest, fees and costs, if a landlord fails timely to pay interest on, or return a security deposit of \$100 to a tenant within 45 days after the

date that tenant vacates a unit, landlord is obligated by RLTO Sections 5-12-080(d), and 5-12-080(f) to pay tenant \$200, an amount equal to two times the security deposit, for the failure timely to return the security deposit. In addition, landlord is obligated by RLTO Sections 5-12-080(c) and 5-12-080(f) to pay tenant \$200 for the failure to pay or credit interest. These awards are independent of, and in addition to landlord's obligation to return to tenant the security deposit itself, and are not abated if the landlord later refunds the deposit or pays interest. Thus, if landlord fails to pay or credit interest and returns the \$100 security deposit on the 46<sup>th</sup> day after the tenant vacates, tenant may nonetheless sue for and recover \$200 under RLTO Sections 5-12-080(d) and 5-12-080(f), and an additional \$200 under RLTO Sections 5-12-080(c) and 5-12-080(f). If landlord never returns the security deposit, tenant may, in addition to recovering \$400 under RLTO Sections 5-12-080(c), 5-12-080(d) and 5-12-080(f), sue for a return of the security deposit of \$100, for a total recovery of \$500, or, in this example, an amount equal to five times the security deposit.

Applying Solomon to this case, Plaintiffs' Complaint could (and should) have included as a count in the Complaint the single count asserted in their Amended Complaint. That count, which Plaintiffs refused to prosecute in the circuit court, seeks damages for the failure to return the Security Deposit itself. By including such a count in the Complaint, Plaintiffs could have (and should have, to the extent they wished to obtain remedial relief) sought a total specified *ad damnum* of \$42,000, exclusive of interest, fees and costs, as follows:

<u>Count</u>	<u>Nature of Claim</u>	<u>Amount</u>
I	Violation of RLTO Section 5-12-080(c)	\$16,800

<u>Count</u>	<u>Nature of Claim</u>	<u>Amount</u>
II	Violation of RLTO Section 5-12-080(d)	16,800
III	Breach of Lease -- Return of Security Deposit	<u>8,400</u>
	Total	<u>\$42,000</u>

In light of the foregoing, Plaintiffs' characterization of the relief they seek in Counts I and II as "remedial" is demonstrably incorrect. Plaintiffs seek to bootstrap their apparent misapprehension of the relief afforded by the RLTO, and their failure to plead, in the Complaint, a count for remediation of actual damages, into an argument for relief in this Court. However, Plaintiffs' strategic decision not to plead a count seeking actual damages in the Complaint, and their equally strategic decision to neglect and voluntarily dismiss the Amended Complaint (which timely sought actual damages) should not serve as the occasion to declare that a grave miscarriage of justice has occurred, let alone make new law. If this Court were to find that Counts I and II timely seek remedial relief and remand the case, Plaintiffs could, as a matter of law, file an amended complaint stating a further claim for return of the Security Deposit. That would, if Plaintiffs characterization of Section 5-12-080(f) of the RLTO is correct, amount to a double recovery.

**C THE FIRST DISTRICT APPELLATE COURT  
PROPERLY REJECTED THE REASONING OF THE  
THIRD DISTRICT APPELLATE COURT IN *TOFT*.**

In City of Peoria v. Toft, 215 Ill. App. 3d 440 (3<sup>rd</sup> Dist. 1991), the Third District Appellate Court stated that

[a]n "ordinance" is a local rule enacted by a unit of government pursuant to authority delegated by the State. By contrast, a "statute" bears the imprimatur of the State legislature (Battershell v. Bowman Dairy Co., 37

Ill. App. 2d 193 (1961)), and the legislature’s use of the phrase “statutory penalty” does not evince an intent to encompass fines or other penalties exacted for violations of local laws. See Clare v. Bell, 378 Ill. 128, 131 (1941) (court rejected application of section 14 of statute of limitations . . . in suit involving county’s collection of real estate taxes and penalty).

Id. at 443-44. In Namur, the First District expressly rejected the foregoing reasoning, as follows:

[w]e reject the reasoning of Toft because an ordinance is a legislative act and is the equivalent of a municipal statute. Halford v. Topeka, 234 Kan. 934, 939, 677 P. 2d 975, 980 (1984), citing the definition of “ordinance” in Black’s Law Dictionary, 989 (5th ed. 1979); see also American Country Insurance Co. v. Wilcoxon, 127 Ill. 2d 230, 243, 537 N.E. 2d 284 (1989) (the court referred to an ordinance as a “municipal statute”). In addition, Toft is contrary to Enright’s holding that actions for penalties for the violation of an ordinance are covered by the statute of limitations for statutory penalties. We hold that section 13-202 applies to plaintiffs’ action under the ordinance because “statutory” is broad enough to cover municipal ordinances.

Namur, 294 Ill. App. 3d at 1013. The First District did not err in the paragraph quoted above. The reasoning of Toft is flawed, for various reasons. First, it is less accurate to say that an “ordinance” is a “local rule” than a “local statute.” That is because municipal “rules” are generally held to be distinct from, and employed by municipalities to carry out the intent of ordinances. *See, e.g.*, Scott v. Rochford, 77 Ill. 2d 507, 512 (1979)

(authority to issue rules conferred by ordinance). Second, the Battershell and Clare cases are mischaracterized, and inapposite. In Battershell, 37 Ill. App. 2d 193, 196 (1<sup>st</sup> Dist. 1961), an ambulance collided with a truck in a Chicago intersection, and the ambulance driver brought a personal injury action. The First District noted that a state statute gave the ambulance the right of way as against other vehicles, and the right to go through a red light at the intersection, but did not relieve the ambulance driver of the duty to drive with due care. At trial, there was conflicting evidence as to the state of the traffic light at the time of the collision, and as to whether the drivers acted with due care. The trial court denied the ambulance driver's motion for a directed verdict and entered judgment on a jury verdict in favor of the truck driver.

On appeal, the ambulance driver argued that the trial court committed error by failing to exclude the trial testimony of a witness for the truck driver as a sanction for discovery abuse. The appellate court agreed, and reversed and remanded the case for a new trial. In *dicta*, the First District rejected the ambulance driver's contention that the trial court improperly instructed the jury as to an unspecified "ordinance of the City of Chicago relating to emergency vehicles,"<sup>1</sup> but found that "[t]he jury should have been instructed with respect to the ordinance of the City of Chicago relating to emergency vehicles, but it should not have been called a statute. Statute is the term applied to laws

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<sup>1</sup> Presumably, the instruction was based on Chicago Municipal Code Section 9-48-010, which permits an authorized emergency vehicle, when responding to an emergency call, to "[p]roceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation."

enacted by the legislature.” Id. at 203. However, the notion that, as a matter of preferred nomenclature, municipal legislative enactments are generally referred to as “ordinances” in Illinois -- in order to distinguish them from legislative enactments of the General Assembly -- is not under dispute. What is under dispute is the notion that the different name requires an entirely different treatment for purposes of Section 13-202.

In Clare v. Bell, 378 Ill. 128 (1941), Will County sought to collect tax penalties from the owner of a parcel of real property. The owner took a direct appeal to this Court on the issue of whether the tax penalties were “statutory penalties” within the contemplation of the predecessor of Section 13-202. This Court rejected owner’s argument on grounds that the foregoing limitations period “did not purport to include the State of Illinois, counties, cities, or other municipal corporations within the limitation prescribed. It is established that unless the terms of a Statute of Limitations expressly include the State, county, municipality or other governmental agencies, the statute, so far as public rights are concerned, as distinguished from private and local rights, is inapplicable to them.” Id. at 130-31 (citations omitted). Notwithstanding the citation to Clare in Toft, the Clare Court did not find that a state limitations period applicable to penalties should not be applied to an ordinance. This Court also rejected owner’s contention that Will County was equitably estopped from collecting the tax penalty because “[p]ublic policy forbids the application of the doctrine of estoppel to a sovereign State where the public revenues are involved,” and a county was “a sovereign state” for purposes of that rule:

[a] county is a public corporation, which exists only for public purposes, connected with the administration of the State government. . . . it has been

pertinently observed that counties are ‘local subdivisions of the State created by the sovereign power of the State of its own will. . . . County and township organizations are created in this State with the view to aid in carrying out the policy of the State at large for the administration of matters of political government, finance, education, taxing, care of the poor, military organizations, means of travel and the administration of justice.’ In short, the doctrine of equitable estoppel does not apply to a county, a mere political subdivision of the State . . . .

Id. at 132. Thus, to the extent that Clare is applicable to the instant case, it would appear to support Defendants’ position, because, like a county, a municipality is a public corporation that exists for public purposes connected with the administration of State government, and is created by the sovereign power of the State, as an aid to the State in carrying out the policy of the State at large. It is the express policy of this State that private persons who wish to penalize misconduct resulting in personal injury must do so promptly, within two years of the accrual of their cause of action. To the extent that Chicago is a municipality created by the State as an aid to the State in carrying out the policy of the State at large, the RLTO must be governed by the two-year limitations period of Section 13-202.

Thus, Battershell is inapposite because it involves, in *dicta*, the preferred descriptive label to be applied to a municipal enactment in a jury instruction, not the limitations period applicable to an ordinance, as distinct from a statute. Clare merely held that the predecessor to Section 13-202 was inapplicable to a cause of action brought by a county, as distinct from a private plaintiff (such as the private Plaintiffs in this case).

To the extent that both Toft and Clare declined to apply Section 13-202 to a municipality and county, respectively, those cases can be distinguished from both Namur and the instant case, which consider whether Section 13-202 is applicable to a private plaintiff.

Namur should be favored over Toft for two additional reasons. First, Namur is consistent with the First District's previous, well-reasoned finding that Section 13-202 is applicable to actions brought pursuant to a municipal ordinance in City of Chicago v. Enright, 27 Ill. App. 559 (1<sup>st</sup> Dist. 1888). In that case, the City brought suit to obtain a penalty from Enright for Enright's violation of an ordinance that required him to obtain a license to sell liquor. Enright argued that the statute of limitations applicable to the City's action was the statute of limitations for criminal prosecutions. The court rejected this argument, holding that an action to collect a penalty for the violation of a municipal ordinance was a civil action governed by the two-year limitations period of the statutory predecessor to the current Section 13-202.

Another reason for favoring Namur over Toft is the former's reliance on the factually similar and well-reasoned case of Menefee v. Ostawari, 228 Cal. App. 3d 239 (1991). In Menefee, a San Francisco landlord was alleged to have wrongfully terminated a month-to-month tenancy, in violation of a local rent control ordinance that provided treble damages for violations. The court entered summary judgment for landlord on grounds that the action was time-barred by the one-year limitations period prescribed by the California Code of Civil Procedure, Section 340, subdivision (1), for "[a]n action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation." The court explained its decision thus:

Claims based upon statutes which provide for mandatory recovery of damages additional to actual losses incurred, such as treble damages, are considered penal in nature, and thus are governed by the one-year limitations period under section 340 . . . . . Certain statutory schemes contain separate, independent statutory provisions for recovery of actual damages and treble damages. In such case, a claim for actual damages under one statute will be governed by a different statute of limitations than section 340, subdivision (1), which will govern the claim for treble damages. Where a statute vests the trial court with the discretionary option of awarding treble damages in addition to actual damages, a claim based upon such statute is not governed by section 340, subdivision (1). Where, however, the allowance of treble damages is, by the terms of the statute, mandatory, such statute provides for a penalty, and an action based thereon will be subject to section 340, subdivision (1).

Menefee, 228 Cal. App. 3d at 243. The tenant in Menefee also argued that because the treble damages of the ordinance were not necessarily intended to punish a landlord, they should not be treated as a penalty pursuant to Section 340. The court rejected that argument as erroneously conflating penal damages with punitive damages. According to the court, penal damages -- such as those mandated by the ordinance in that case -- are entirely distinct from punitive damages. The court concluded that “regardless of the purpose of the provision for treble damages under the ordinance, such provision constitutes a penalty . . . . Whether such result was intended by the drafters of the Rent Control Ordinance or is the product of inartfull legislative drafting, is immaterial to our construction of its unambiguous language. Further, neither [the provision of the Rent

Control Ordinance invoked by tenant] nor any other provision of the Rent Control Ordinance contains any separate, severable provision for recovery of untrebled damages alone.” *Id.* at 245. In reaching the foregoing conclusion the court cited an authority for the proposition that the “applicable statute of limitations depends upon [the] gravamen of [an] action rather than form of pleading.” *Id.*

The reasoning of Menefee applies with equal force here. In this case, as in Menefee, an ordinance provides for recovery of damages pursuant to a mathematical formula. In Menefee, the ordinance provides for money damages of not less than three times actual damages . . . in addition to any other existing remedies . . . available to the tenant . . . .” In the instant case, the RLTO provides for an award equal to two times the security deposit. In both cases, the award is in addition to any other existing remedies that may be available to the tenant, such as an action for return of an unpaid security deposit itself. *See Solomon v. American Nat’l Bank & Trust Co.*, 243 Ill. App. 3d 132 (1<sup>st</sup> Dist. 1993), discussed *infra*, at pp. 18-22. In both cases, the award is mandatory if certain conduct of the landlord is proven, such that a trial court has no discretion to award actual damages. Here, as in Menefee, the ordinance constitutes a penalty, subject to the state statute governing the limitations period for penalties.

**D CALLED BY ANY NAME, AN ORDINANCE IS ESSENTIALLY A “LOCAL STATUTE.”**

To avoid confusion based on non-substantive, regional differences in customary nomenclature, “local statute” is often used in lieu of “ordinance” in federal statutes, federal court opinions, and interstate settlement agreements. *See, e.g., Watters v. Wachovia Bank, N.A.*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 1559, 1583 (2007) (Secretary of

Transportation authorized to decide whether a “state or local statute” conflicts with federal regulation of hazardous waste transportation); Nixon v. Mo. Mun. League, 541 U.S. 125, 129 (2004) (under Federal Telecommunications Act, “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service”); Verizon Communs., Inc. v. FCC, 535 U.S. 467, 492 (2002) (same); Ill. Bell Tel. Co. v. Vill. of Itasca, 503 F. Supp. 2d 928, 938 (N.D. Ill. 2007) (same); Primeco Pers. Communs., L.P. v. State Commerce Comm’n, 196 Ill. 2d 70, 77 (2001) (same). *See also* Payton v. County of Kane, 308 F. 3d 673, 679 (7<sup>th</sup> Cir. 2002) (juridical link doctrine most often applies where “state or local statute” requires common action); Burroughs v. Hills, 741 F. 2d 1525, 1530 (7<sup>th</sup> Cir. 1984) (“[p]ersons harmed unreasonably by conditions on neighboring property traditionally have been able to enjoin those conditions through suits based on state common law theories or state or local statutes”); In re Chicago, M., S. P. & P. R. Co., 738 F. 2d 209, 211, fn. 2 (7<sup>th</sup> Cir. 1984) (noting that “where a state or local statute supplies the authority for a condemnation, any conflict with the Bankruptcy Act must be resolved in favor of that Act”); Wagner v. Nutrasweet Co., 95 F. 3d 527, 529 (7<sup>th</sup> Cir. 1996) (quoting from release of claims under “any common law cause of action or pursuant to any federal, state or local statute, order, law or regulation”); LaSalle Nat’l Trust, N.A. v. ECM Motor Co., 76 F. 3d 140, 142 (7<sup>th</sup> Cir. 1996) (quoting from contract language regarding materials identified as hazardous under any “federal, state or local statutes, rule or regulation”); O’Loughlin v. Servicemaster Co. Ltd. Partnership, 216 Ill. App. 3d 27, 29 (1<sup>st</sup> Dist. 1991) (quoting from contract language regarding charges or insurance levied or required by any “federal, state,

or local statutes” relating to the employment of employees).

The City of Chicago is authorized by a state statute to “pass all ordinances and make all rules and regulations proper or necessary, to carry into effect the powers granted to municipalities, with such fines or penalties as may be deemed proper.” *See* 65 ILCS 5/1-2-1. Statutes and ordinances are both written legislative enactments, differing only in respect of their place of origin. This fundamental sameness is reflected in the fact that statutes and ordinances are subject to the same standard of appellate review, and subject to the Civil Practice Act and the discovery procedures mandated therein. *See Danville v. Hartshorn*, 131 Ill. App. 2d 999, 1003 (4<sup>th</sup> Dist. 1971).

In light of the foregoing, Plaintiffs’ assertion that “in this case and in others, the First District has inserted into the unambiguous language of Section 13-202 an additional term to make it apply to ordinances as well as statutes,” is just plain wrong. It is Plaintiffs who attempt to insert a proviso into the language of Section 13-202 stating that for purposes of that section an “ordinance” is not a “statute,” even though both an ordinance and statute are legislative enactments, subject to the same policy concerns in respect of their limitations periods for private plaintiffs.

The power of a municipality to pass ordinances flows from the State, which, “in its legitimate exercise of the police power, has delegated the exercise of [certain] functions . . . to the various municipalities, subject to constitutional limitations.” *Decatur v. Chasteen*, 19 Ill. 2d 204, 210 (1960). The City of Chicago promulgated the RLTO pursuant to a delegation of authority from Springfield. Why, then, should the RLTO be exempt from the law of the land, as enunciated by the State in Section 13-202? According to Plaintiffs, municipalities that exercise power delegated to them by the State

to create a private cause of action that penalizes landlords without proof of actual damages should be exempted from state law prescribing limitations periods for penal actions, and may accomplish that result simply by calling the pertinent enactment an “ordinance,” as distinct from a “statute.” That makes no sense.

**III. THE COURTS BELOW CORRECTLY APPLIED ILLINOIS’ CLEAR AND SENSIBLE TEST FOR IDENTIFYING “STATUTORY PENALTIES.”**

As Plaintiffs state in their Brief, Illinois’ test for identifying a statutory penalty (as distinct from a statute that contemplates recovery of actual damages) is set forth in McDonald’s Corp. v. Levine, 108 Ill. App. 3d 732 (2<sup>nd</sup> Dist. 1982), as follows:

A statute is a statutory penalty if it imposes automatic liability for a violation of its terms and the amount of liability is predetermined by the act and imposed without actual damages suffered by the plaintiff. A statute is remedial when it gives rise to a cause of action to recover compensation suffered by the injured person.

Id. at 738 (citations omitted). Defendants agree with Plaintiffs’ assertion, in the Opening Brief, that “this is the rule applied by all of the other published decisions addressing the subject including the First District.” Defendants further agree that Plaintiffs are not asking for awards, in Counts I and II, without alleging that Plaintiffs have suffered actual damages, and that actual damages are alleged because “Defendants improperly retained Plaintiffs’ \$8,400 security deposit.” However, Defendants emphatically disagree with the demonstrably incorrect notion that “[t]he liability Plaintiffs seek to impose does not arise automatically,” or “exists because Plaintiffs have suffered actual damages.” As a matter

of law, the liability that Defendants seek to impose does arise automatically, upon the occurrence of the events stated in Sections 5-12-080(c) and 5-12-080(d) of the RLTO, and without the need to plead or prove actual damages. Those two provisions do not mention, let alone require proof of any actual damages in order to obtain the award contemplated by Section 5-12-080(f). In addition, the amount of the award prescribed by Section 5-12-080(f) is the same for each of the four subsections of the RLTO (*i.e.*, subsections (a) through (e) of Section 5-12-080), regardless of the number of subsections violated, and notwithstanding the actual quantum of damages that may accrue as a result of those distinct violations.

Curiously, Plaintiffs state that “[RLTO Section 5-12-080 does not] impose a specific sum to be awarded. Rather, any award is based entirely on the actual amount of the security deposit [that] Plaintiffs paid and have so far lost.” This argument fails to note that RLTO Section 5-12-080(f) imposes a sum to be awarded that varies solely as a function of one variable that may not have anything to do with actual damages suffered: the amount of the security deposit. The penalties sought by Plaintiffs in Counts I and II pursuant subsections (c), (d), and (f) of Section 5-12-080 of the RLTO attach regardless of whether the security deposit is paid one day late or not at all. In the event of a late or partial security deposit refund (as in the Solomon case discussed *infra*), the specific sum to be awarded -- because it is based on the fixed amount of a security deposit as distinct from some other number that varies as a function of actual damages -- may well have nothing to do with actual damages, unless that occurs by sheer coincidence. Plaintiffs suggest, inexplicably, that monetary awards that they have requested in this case (*i.e.*, \$33,600) are approximately equal to the actual, monetary losses they have suffered as a

result of Defendants' failure to return the \$8,400 Security Deposit. However, even if that were true (it is not), it would be entirely coincidental.

Plaintiffs begin with a demonstrably incorrect assertion -- that the "awards" they seek pursuant to Counts I and II are approximately equal to their actual damages -- and then argue that they have been deprived of the right to obtain remedial relief by concerns about a hypothetical plaintiff. Plaintiffs' assertion that RLTO awards are almost always equal to actual damages is neither true about Plaintiffs nor likely to be true about anyone else. Plaintiffs' assert that the First District "concluded that the test for whether a claim is remedial or penal looks not at the particular plaintiff and the specific harm for which redress is sought, but rather at possible ways someone else could use the statute or ordinance." This is just plain wrong. It mischaracterizes the Mandate, as even a cursory examination of that opinion shows. After quoting the test for identifying a "statutory penalty" -- which test says the enactment is to be considered, and says nothing about examining a particular plaintiff, let alone a hypothetical one -- Plaintiffs chide the First District for failing to consider factors not included in that test.

The First District looked -- as it was directed to do by the applicable test -- at the language of the RLTO. It then asked whether the provision in question imposes automatic liability for a violation of its terms. It correctly found that it does. It then asked whether the amount of liability is predetermined and imposed without actual damages suffered by the plaintiff. It correctly found that, as well. The First District appropriately examined the language of the RLTO to determine if it imposes automatic, predetermined liability for violation of its terms without proof of actual damages suffered by the plaintiff. The appellate court correctly concluded that the awards in question

under the RLTO are not linked to actual damages. The fact that an award contemplated by the RLTO might by sheer happenstance approximate the amount of one plaintiff's actual damages is of no consequence here.

Plaintiffs say that the First District's decision in this case is based on the mere possibility that the RLTO "will be used in a putatively penal manner" -- whatever that means. However, for the reasons set forth above, Section 5-12-080(f) of the RLTO is penal even if by happenstance it yields an award that is exactly equal to a hypothetical plaintiff's actual damages. Plaintiffs say, incorrectly, that that is what has happened in this case, but \$33,600 cannot be equal to \$8,400, even if interest, fees, and costs are factored in. Notwithstanding Plaintiffs' assertion to the contrary, the First District's decision in this case was properly based on what the RLTO actually says, not how some theoretical plaintiff might "use" the RLTO.

### **CONCLUSION**

Defendants pray this Court affirm the appellate and circuit courts, both of which correctly, logically, and appropriately found that Section 13-202 applies to the penalties sought by Plaintiffs in Counts I and II of the Complaint. As a matter of public policy (to say nothing of logic, and the case law discussed above), there is no principled reason to distinguish between a penalty enacted in Springfield and one adopted by the City Council of the City of Chicago when deciding what statute of limitations should apply. Plaintiffs express concern about a split in the appellate districts. However, if this Court were to adopt Plaintiffs' arguments, and exempt the RLTO from the law of this State, as expressed in Section 13-202, that ruling would create, not resolve, a problem of unequal treatment based on geography. If a municipality may opt out of a state statute of

limitations simply by styling its enactments “ordinances,” as distinct from “local statutes” or some other name, then municipal ordinances are elevated over state law and may nullify the statute of limitations in Illinois, causing such periods to vary as a function of geography. The result would be a crazy quilt in which urbanites have privileges under ordinances that are unavailable to persons living in rural or unincorporated areas. That is not the law. That should not be the law. This Court should affirm the courts below. In addition, because Plaintiffs repeatedly and intentionally abandoned the claim for breach of lease (and actual damages) set forth in their Amended Complaint (which Defendants concede is subject to the five year limitations period applicable to written contracts that have been orally modified), this Court should not remand the case to the circuit court with instructions that Plaintiffs may proceed on that claim.

**WHEREFORE**, Defendants, Marc Realty, LLC, and Elliott Weiner, request that this honorable Court affirm the First District Appellate Court's decision in this cause.

Respectfully submitted,

**MARC REALTY, L.L.C. and  
ELLIOTT WEINER**

A handwritten signature in black ink, appearing to be 'K' followed by a long horizontal flourish.

By:

One of their attorneys

Kent Maynard, Jr.  
KENT MAYNARD & ASSOCIATES LLC  
17 North State Street, Suite 1700  
Chicago, Illinois 60602  
(312) 423-6586

**CERTIFICATE OF COMPLIANCE**

I certify that his Petition conforms to Rule 341(a) and (b). The length of this Brief is 34 pages.

By:

A handwritten signature in black ink, appearing to be 'K' followed by a long horizontal stroke.

Kent Maynard, Jr.  
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**CERTIFICATE OF SERVICE**

To:

Bert Zaczek  
Amy Pikarsky  
415 N. LaSalle St., Suite 300  
Chicago, Illinois 60610

The undersigned, an attorney, caused to be served upon the individuals noted above, Defendants' Brief by placing 1 copy in a sealed envelope with proper, first-class postage affixed and depositing it in the mail box at 17 North State Street, Ste. 1700, Chicago, IL on May 12, 2008, and by emailing a "pdf" scan of the brief to a previously-verified email address of Mr. Zaczek.

A handwritten signature in black ink, consisting of a stylized initial 'K' followed by a long, horizontal, wavy line.

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One of their attorneys

**APPELLEES' SUPPLEMENTAL APPENDIX**



**TABLE OF CONTENTS FOR APPELLEES' SUPPLEMENTAL APPENDIX**

Amended Complaint	October 4, 2006	Exhibit 1
Order to Continue Arbitration Hearing on Amended Complaint	February 23, 2007	Exhibit 2
Order Denying Motion to Further Continue Arbitration	April 18, 2007	Exhibit 3



**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
MUNICIPAL DEPARTMENT, FIRST DISTRICT**

KEN LANDIS and ANNA LANDIS,	)	
	)	
Plaintiff,	)	<b>Jury Trial Requested</b>
	)	Amount sought: \$8,400 plus
	)	costs and interest
v	)	
	)	Case No : 06 M1 100202
MARC REALTY, LLC and ELLIOI	)	
WEINER,	)	
	)	
Defendants	)	

**AMENDED COMPLAINT**

Ken and Anna Landis ("Plaintiffs"), by their attorney, Bert Zaczek, state for their Complaint:

**Breach of Contract**

1 On or about May 5, 1999, Plaintiffs signed a residential lease for property commonly known as 1439 N Dearborn, Apartment 2, Chicago, Illinois ("the Apartment")

2 Marc Realty, L L C. was the Plaintiff's landlord

3 Marc Realty managed the building where the Plaintiff's Apartment was located

4 The Plaintiffs' lease was continued from time to time

5 The lease shows the name "Elliot Weiner" under the word "Lessor" A copy of the final lease is attached hereto In this Complaint, Marc Realty, L L C and Elliot Weiner are referred to jointly as "Defendants"

6 Plaintiffs tendered \$8,400 as a security deposit for thee Apartment

7 During the course of the Plaintiffs' lease term, a leak appeared in the Apartment.

8 Despite Plaintiffs' repeated requests to Marc Realty to have the leak repaired, and despite some repair efforts, Marc Realty was unable to completely stop the leak

9 As a result of the leak that was not fixed, Plaintiffs decided to move

10 Prior to November 16, 2001, the Defendants agreed to allow the Plaintiffs to move and to return their security deposit because of its inability to repair the leak

11 Plaintiffs moved on November 16, 2001

12 Plaintiffs surrendered to Marc Realty the keys to the Apartment on November 16, 2001

13 Defendants accepted the return of the keys

14. Plaintiffs fulfilled all conditions required of them under the Lease as modified by the agreement that allowed them to move early

15 Defendants never returned the Plaintiffs security deposit

16 Plaintiffs have been damaged as a result of the breach

17. Pursuant to the terms of the lease, the Defendants were obligated to return the security deposit at the end of the lease

18 Plaintiffs have attempted on numerous occasions to obtain the return of the security deposit However, Defendants have refused without offering any explanation.

19 There is no reason for Defendants' refusal to return the security deposit As such, its refusal is unreasonable and vexatious

20. Pursuant to 815 ILCS 205/2, Plaintiffs are entitled to 5% interest on their \$8,400 in security deposit from November 16, 2001

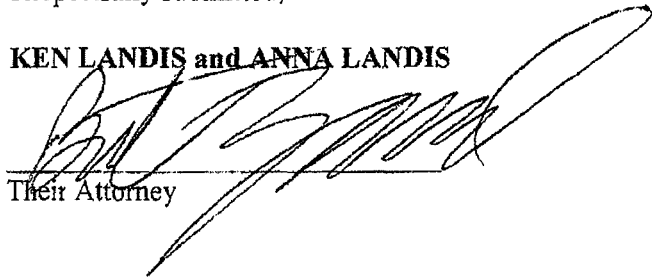
21 The failure to return the security deposit is a failure to follow the terms of a written instrument

**WHEREFORE**, Plaintiffs, Ken Landis and Anna Landis, request an award of \$8,400, court costs and prejudgment interest of 5% per year from November 16, 2001, against Marc Realty, L L C and Elliot Weiner

Respectfully submitted,

**KEN LANDIS and ANNA LANDIS**

By:

  
Their Attorney

Bert J Zaczek  
415 North LaSalle Street  
Suite 300  
Chicago, IL 60610  
312 527-1090  
Attorney No 37506

CHICAGO APARTMENT LEASE

Tenant Ordinance Summary Attached

Unfurnished

DATE OF LEASE	TERM OF LEASE	MONTHLY RENT	SECURITY DEPOSIT

**LESSEE**

NAME: Ken & Anna Landis

APT. NO Unit #6

ADDRESS OF PREMISES: 1439 N. Dearborn

CITY: Chicago, Illinois 60618

**LESSOR**

**IDENTIFICATION OF OWNER AND AGENTS**

Owner or Authorized Management Agent:  
Marc Reilly - Elliot Weiner

NAME: Marc Reilly  
223 West Jackson  
Chicago, Illinois 60603  
312-263-8003

**NOTICE OF CONDITIONS AFFECTING HABITABILITY**

Person Authorized to act on Behalf of Owner for purpose of Service of Process and Receipting for Notices

NAME: \_\_\_\_\_  
ADDRESS: \_\_\_\_\_

I hereby acknowledge that Lessor has disclosed any code violations, code enforcement litigation and/or compliance board proceedings during the previous 12 months for the apartment and common areas and any notice to terminate tenancy or any other action which may be taken against the apartment or common areas.

**ADDITIONAL COVENANTS AND AGREEMENTS (If any)**

used as rent payments. All fixtures, blinds and carpeting are a part of the property of the lessor. Any provisions of this lease which is inconsistent or derogation of the Residential Landlord and Tenant Ordinance of the City of Chicago shall be automatically excluded from this lease and be null and void and of no force or effect. One garage space and \_\_\_\_\_ are included. Lessee to pay for gas & electricity.

**LESSEE**

Ken Landis (SEAL)

**LESSOR**

Elliot Weiner (SEAL)

**LEASE COVENANTS AND AGREEMENTS**

1. **RENT:** Lessee shall pay to the Lessor or Lessor's agent the monthly rent set forth above on or before the first day of each and every month in advance at Lessor's address stated above or such other address as Lessor may designate in writing. The time of each and every payment of rent is of the essence of this Lease.

2. **LEASE CHARGES:** The monthly rent shall be increased \$10.00 per month for the first \$300.00 in monthly rent plus five (5%) percent per month or any amount in excess of \$300.00 in monthly rent if paid after the fifth of the month. Rent shall be considered received, if mailed, on the date of receipt.

3. **SECURITY DEPOSIT:** Lessee has deposited with Lessor the security deposit as set forth above, to be retained by Lessor to ensure that Lessee shall fully perform each and every term and obligation provided in his Lease. If Lessee fully performs each and every obligation as provided in this lease and pays all sums due to Lessor, then Lessor, after the Lessee has surrendered possession of the premises and has delivered the keys hereto, shall refund said deposit to Lessee, including interest as is provided by law. If Lessee has failed to perform or comply with any of the provisions in this Lease, then Lessor shall deduct any damages from the security deposit. The security deposit shall not be treated as an advance payment of rent, and Lessee may not apply the security deposit as rent.

4. **POSSESSION:** If Lessor cannot give Lessee possession on the date fixed for commencement of the term, the rent shall be abated until such time as the premises are available for Lessee's occupancy, or Lessee may upon written notice terminate the Lease.

5. **APPLICATION:** The Lessee's application and all the representations contained therein are incorporated as a part of this Lease. Lessee warrants that all the information contained in the application is true, and that if any of said information is false, Lessor may terminate this Lease.

6. **CONDITION OF THE PREMISES:** Lessee has examined the premises prior to accepting same and prior to the execution of this Lease, and Lessee is satisfied with the physical condition thereof, including but not limited to the heating, plumbing and smoke detectors and taking possession shall be conclusive evidence of Lessee's receipt thereof in good order and repair. No promises as to condition or repair have been made by Lessor or its agent which are not herein expressed, and no promises to decorate, repair or modify the premises, which are not contained herein, have been made by Lessor or its agent.

7. **LESSEE TO MAINTAIN:** Lessee shall keep the premises and the fixtures and appliances therein in a clean, sightly and healthy condition, and in good repair, and in accordance with any and all ordinances in such cases made and provided, at Lessee's own expense, and upon the termination of his lease, for any reason, shall yield and return the same back to Lessor in good condition of cleanliness and repair as at the date of the execution hereof, reasonable wear and tear excepted. Lessee shall make all necessary repairs to the premises whenever damage to the same has occurred or repairs

not in good repair and in a clean, sightly and healthy condition, Lessor or his agents may replace the premises in the same condition of repair, sightliness and cleanliness as existed at the date of execution of this Lease. Lessee agrees to pay Lessor for all expenses incurred by Lessor in replacing the premises in that condition. Lessee shall not cause or permit any waste, misuse or neglect to occur in the water, gas, utilities or any other portion of the premises.

8. **USE OF PREMISES:** The premises shall be occupied solely for residential purposes by Lessee and those persons listed in the Application for this Lease. Neither Lessee nor any persons residing with or visiting Lessee shall suffer, perform or permit any act or practice that may damage, the reputation of the Building, or be injurious or disruptive to the Building and operation thereof, or be disturbing to other tenants, be illegal, immoral, or increase the rate of insurance on the Building. Lessee shall be responsible for the conduct of all persons residing with or visiting Lessee.

9. **SUBLET OR ASSIGNMENT:** Lessee shall not sublet the premises or any part thereof, nor assign this Lease, without, in each case, prior written consent of Lessor which consent shall not be unreasonably withheld. Lessor shall accept a reasonable sublease as provided by ordinance.

10. **NO ALTERATIONS:** Lessee shall not make any alterations to the premises nor install any appliances, locks or other equipment of any kind without the prior written consent of Lessor.

11. **ACCESS:** Lessee shall not unreasonably withhold consent to the Lessor to enter the apartment at reasonable times for reasonable purposes as provided by statute or Ordinance.

12. **HEAT AND WATER:** Lessor shall furnish hot and cold water and if heating is under the control of the Lessor, shall also furnish heat in reasonable amounts at reasonable hours as provided by statute or Ordinance except when prevented by causes beyond Lessor's control or when the water and heating system are being repaired. Lessee shall at all times maintain the temperature at a minimum of 43 degrees and shall be responsible for all damages resulting from the failure to do so.

13. **RIGHT TO RELET:** If Lessee shall remove a substantial portion of his personal property or otherwise abandon or vacate the premises, the Lessor may immediately re-let the premises as provided by Ordinance; or if the premises become vacant by reason of Lessee's breach, or if this Lease has been terminated by reason of Lessee's breach, or if Lessee has been evicted, Lessor may re-let the premises, and Lessee shall be liable and pay for the expenses of reletting and losses to the end of the term or as provided by Ordinance. Tenant's obligation to pay rent during the term or any extension thereof shall continue and shall not be waived, released or terminated by the service of a five-day notice, demand for possession, notice of termination of tenancy, the filing of a forcible entry and detainer action, or judgment for possession, or any other act resulting in the termination of Lessee's right of possession.

14. **FORCIBLE DETAINER:** If Lessee defaults in the payment of rent or any part thereof, Lessor may distrain for rent and shall have a lien

or his agents, at his option, may terminate this Lease, and, if abandoned or vacated, may re-enter the premises. Non-performance of any of Lessee's obligations shall constitute a default and forfeiture of this lease, and Lessor's failure to take action on account of Lessee's default shall not constitute a waiver of said default

15. **NOTICES:** Any demand or notice may be served by delivering a copy to the Lessee, or by leaving the same with some person above the age of twelve years, residing on or in possession of the premises; or by sending a copy of said notice to the Lessee by certified mail, return receipt requested, or by posting the same on Lessee's door to the premises, if no one is in actual possession of the premises

16. **FIRE AND CASUALTY:** If the premises shall be rendered untenable by fire or by other casualty, the Landlord shall not be obligated to restore the premises and tenant may terminate this Lease as provided by statute or Ordinance

17. **DISHONOR:** In the event that Lessee's rental payment is dishonored when negotiated by Lessor or his agents, Lessor shall have no obligation to re-deposit same, and reserves the right to demand that all future rental payments be made by money order or certified funds. Lessee shall pay Lessor the sum of \$25.00 as additional rent for any dishonored payment

18. **SURRENDER OF PREMISES AND RETURN OF POSSESSION:** Lessee shall not be required to renew this Lease more than ninety days prior to its expiration as provided by Ordinance, and Lessor shall notify Lessee of Lessor's intention not to renew the Lease at least thirty days prior to its expiration so long as Lessee is not in default under the terms of this Lease; as provided by Ordinance. At the termination of this Lease, by lapse of time or otherwise, Lessee shall yield up and surrender immediate possession to Lessor, and deliver all keys to Lessor or his agent. If Lessee fails to vacate the premises upon termination, Lessee shall pay a sum equal to double the amount of rent herein set forth as liquidated damages for the time that possession is withheld; and

- (A) Lessor may, by giving tenant written notice thereof, extend the term of this Lease upon all the terms and conditions herein for one year, but with a rental of 20% greater than the rental contained herein; or
- (B) If Lessor fails to provide written notice to Lessee of Lessor's election under (A), Lessee shall become a month-to-month tenant, upon all the terms and conditions contained herein. Lessee shall also compensate Lessor for any and all damages incurred by Lessor by virtue of Lessee's failure to vacate the said premises in accordance with the terms of this lease. The payment or acceptance of rent after expiration of the Lease, shall not extend this Lease

19. **EMINENT DOMAIN:** If the whole or a substantial portion of the premises is condemned by any competent authority for any public use or purpose, this Lease shall be terminated

20. **JOINT OBLIGATIONS:** The words 'Lessor and Lessee' when used in this Lease shall be construed to be plural if more than one person comprises either party to this Lease, and each shall be jointly and severally obligated to perform all of the terms and conditions of this Lease

21. **LEGAL EXPENSES:** Lessee shall pay all costs, expenses and attorneys fees which shall be incurred or expended by Lessor due to Lessee's breach of the covenants and agreements of this Lease, to the extent provided for by law, Court rules, statute or Ordinance

22. **SMOKE DETECTORS:** Lessee acknowledges that at the time of obtaining initial possession of the premises, all smoke detectors required to be installed in the premises have been installed and are in good working order. Lessee agrees to repair and maintain the smoke detector devices including replacement of the energy source when needed

23. **BINDING ON HEIRS:** All covenants contained herein shall be binding upon and future to the benefit of Lessor and Lessee and their respective heirs, executors, administrators, assigns and successors

24. **REMEDIES CUMULATIVE:** The Lessor's rights and remedies under this Lease are cumulative. The exercise of any one or more thereof shall not exclude nor preclude Lessor from exercising any other right or remedy

25. **SEVERABILITY CLAUSE:** If any clause, provision or portion of this Lease shall be ruled invalid or unenforceable, said decision shall not invalidate nor render unenforceable the remainder of this Lease

26. **STORAGE:** Lessor shall not be obligated to provide Lessee storage

27. **INSURANCE:** Lessor is not an insurer of Lessee's property. Lessee shall carry sufficient insurance to insure all of Lessee's property located on Lessor's premises

28. **SUBORDINATION:** Lessee will not do any act which shall encumber Lessor's title to the premises, and if Lessee causes a lien to be placed on the title, or premises, Lessor may discharge the lien and Lessee will reimburse Lessor the amount Lessor expended. This lease shall not be recorded by Lessee and is, and shall be, subordinate to any present or future mortgages now, or hereafter, placed on the premises

29. **RULES AND REGULATIONS:** Lessee shall observe and abide by the Rules and Regulations set forth in this Lease, and agree to be bound by and comply with any further reasonable rules and regulations as may be established by the Lessor

**RULES AND REGULATIONS**

- 1 No dogs, cats, or other animals shall be kept or allowed in the premises except with the Lessor's prior consent, and subject to the conditions set forth in any such consent. No animals are permitted without a leash in any public areas of the premises
- 2 No additional locks or other similar devices shall be attached to any door without Lessor's written consent
- 3 Lessee shall not install or operate any machinery refrigeration or heating devices or use or permit onto the premises any inflammable fluids or materials which may be hazardous to life or property
- 4 Hallways, stairways and elevators shall not be obstructed or used for any purpose other than ingress and egress from the Building, nor shall children be permitted to play in the common areas, nor shall Lessee place or store any items in the hallways or common areas of the Building
- 5 No musical instrument shall be played and no radio or television set shall be operated at any time in such manner as to disturb or annoy other occupants of the building, nor shall other noises be made which will disturb or annoy any occupants of the building. Operation of electrical devices which interfere with radio or television reception is not permitted
- 6 All moving and delivery shall be through the rear entrance stairway or service elevator at hours designed by Lessor
- 7 Lessee shall maintain the smoke detectors, and replace the batteries when necessary
- 8 Lessee shall not install or maintain a washer, dryer or dishwasher on the premises without Lessor's prior written consent. Lessee shall not run water for an unreasonable length of time
- 9 Lessee shall only cook in the kitchen and shall not barbecue on porches or balconies
- 10 Washrooms shall not be used for any purpose other than that for which they are designed, and no rubbish, rags, or injurious items shall be placed in plumbing facilities or receptacles
- 11 Lessee shall not place nor permit any article or antenna outside of the windows, on the exterior walls, or on the roof of the Building, and shall not throw or drop any article from any window
- 12 Lessee shall not place, erect or install any signs or advertisements on the windows nor on any part of the Building or premises
- 13 All garbage or refuse shall be securely wrapped and placed in the incinerator or garbage container
- 14 Water beds are not permitted in the premises without Lessor's written consent
- 15 Lessee shall not interfere in any manner with the heating or lighting or other fixtures in the building nor run extension cords or electrical appliances in violation of the Building Code
- 16 Lessee shall not solicit, canvass nor conduct any door-to-door activities on the premises
- 17 Lessor has the right to bar individuals from the premises. You must inform your guests of all lease provisions regarding use of the premises and all rules and regulations. If these provisions are violated by your guests, they may be barred and/or arrested for criminal trespassing, after they have received a barred notice and then have been placed on a barred list by Lessor. If you violate the lease or any of the rules and regulations, it is grounds for termination of your tenancy

**ASSIGNMENT BY LESSOR**

In consideration of One Dollar to the undersigned in hand paid, and of other good and valuable consideration, the receipt of which is hereby acknowledged, Lessor hereby transfers, assigns and sets over to \_\_\_\_\_ all right, title and interest in and to the above Lease and the rent thereby reserved except rent due and payable prior to \_\_\_\_\_, 20\_\_\_\_\_

Dated \_\_\_\_\_, 20\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
(SEAL)  
(SEAL)

**GUARANTEE:**

In consideration of One Dollar and other good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned Guarantor hereby guarantees the payment of rent and performance by Lessee, Lessee's heirs, executors administrators, successors or assigns of all covenants and agreements of the above Lease

Dated \_\_\_\_\_, 20\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
(SEAL)  
(SEAL)



IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
MANDATORY ARBITRATION PROGRAM  
FIRST MUNICIPAL DISTRICT

Landis

v.

Marc Realty et al

NO. 26M1 100202

IN ARBITRATION

ORDER RESETTING ARBITRATION HEARING

This cause coming on to be heard on the motion of the attorney for Plaintiff

due notice having been given and the court being fully advised in the premises:

THE COURT FINDS:

1. This cause was transferred to the Mandatory Arbitration Calendar on \_\_\_\_\_ (month) \_\_\_\_\_ (date) by Judge \_\_\_\_\_.

2. Subsequently, this cause was set for a Mandatory Arbitration Hearing on 2-26 (month) 07 (date) at 8:30 (time) AM PM.

IT IS ORDERED:

1. That the said Mandatory Arbitration Hearing set for February 26 (month) 2007 (date) at 8:30 (time) AM PM is hereby vacated.

2. That the said Mandatory Arbitration Hearing is hereby reset to April 19 (month) 2007 (date) at 8:30 (time) AM PM without further notice at:

- District 1: 222 N. LaSalle, St. 13th Floor, Chicago, IL 60610
- District 2: 5600 Old Orchard Rd., Skokie, IL 60077
- District 3: 2121 Euclid, Rolling Meadows, IL 60008
- District 4: 1500 Maybrook Dr., Maywood, IL 60153
- District 5: 10220 S. 76th Ave., Bridgeview, IL 60455
- District 6: 16501 S. Kedzie Pkwy., Markham, IL 60426

3. That the attorney who prepares this order shall send a copy of same to all Attorneys of record not present in court, and a copy of this order is to be delivered to the Court Administrator of the specified location.

Judge Laurence J. Dunford

Atty. No.: 35506  
 Name: Zaczen  
 Atty. for: Plf  
 Address: 115 W. LaSalle 5-300  
 City/Zip: Chicago IL 60610  
 Telephone: 312 507-1090

FEB 23 2007

ENTER: Circuit Court - 1877

Judge \_\_\_\_\_ Judge's No. \_\_\_\_\_



